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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS-2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 06 008 51555

Office: VERMONT SERVICE CENTER

Date: MAY 11 2009

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted. The decision of the AAO will be withdrawn, and the petition will be approved.

The petitioner provides information technology consulting services. It seeks to employ the beneficiary permanently in the United States as an Oracle Software Engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submitted a brief and additional evidence. The AAO concurred with counsel that the director erred in his analysis for 2004, but upheld the director's finding that the petitioner had not demonstrated its ability to pay the proffered wage in 2003.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 13, 2002. The proffered wage as stated on the Form ETA 750 is \$64,189 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2002.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$161,195, a net income of \$1,941 and five employees.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Service (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability

to pay the proffered wage. On appeal, the petitioner submitted pay stubs reflecting that the petitioner paid the beneficiary \$18,296.69 from August 2002 through December 2002. The petitioner also submitted Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements to verify the following wages: \$58,833.13 in 2003, \$60,400 in 2004 and \$64,400.14 in 2005. The AAO concluded that the petitioner had demonstrated that it paid the full proffered wage in 2005 but that it must demonstrate its ability to pay the difference between the proffered wage and the wages actually paid for 2002, 2003 and 2004, \$45,892.31, \$5,355.87 and \$3,789 respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The AAO's decision focused on an analysis of the petitioner's Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for 2003, which provides the following information:

Net income	(\$4,096)
Current Assets	\$2,471
Current Liabilities	\$3,033
Net current assets	(\$562)

The petitioner did not pay the full proffered wage in 2003. In that year, the petitioner suffered a net loss and its current liabilities exceeded its current assets. Thus, the director concluded that the petitioner had not established its ability to pay the difference of \$5,355.87 between the proffered wage and the actual wages from net income or net current assets.

On appeal, counsel asserted that the petitioner suffered a net loss in 2003 because it made the discretionary decision to repay a shareholder loan of \$22,507 that was not due that year. The petitioner submitted a letter from the accountant that prepared the petitioner's 2003 tax return explaining that the repaid loan was not a current asset and, thus, was not due that year. The AAO acknowledged that the petitioner's 2003 Schedule L reflects a shareholder loan of \$22,507 at the beginning of 2003 but not at the end of 2003. While counsel asserts that the AAO accepted that the repayment of this loan was discretionary, the AAO actually stated: "Even assuming the repayment of this loan was discretionary, funds expended during any year are no longer available to pay the proffered wage." Thus, the AAO concluded that the petitioner had not established that any other funds were available to pay the difference between the proffered wage and wages paid in 2003. The AAO further noted that had that liability remained outstanding in 2004, it might have adversely impacted the petitioner's ability to pay the proffered wage in that year by requiring at least some repayment during that year.

On motion, the petitioner submits a letter from its sole shareholder confirming that the repayment of the loan was discretionary and would not have been repaid if the petitioner had been obligated to pay the beneficiary a higher wage. We note that the petitioner did pay the beneficiary the wage offered on the Form I-129 nonimmigrant petition.

As in *Matter of Sonogawa*, 12 I&N Dec. at 612 (Reg'l. Comm'r. 1967), USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is

replacing a former employee or an outsourced service, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **The petitioner has met that burden.**

ORDER: The decision of November 5, 2008 is withdrawn, and the petition is approved.